No. 11,990

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ESTELLA LATTA, et al.,
Appellants,

vs.

WESTERN INVESTMENT COMPANY, et al.,
Appellees.

BRIEF FOR APPELLANTS.

BUSICK & BUSICK,
Bank of America Building, Sacramento 14, California,
CHARLES H. SECCOMBE,
3124 E. 14th Street, Oakland, California,
S. J. BENNETT,
Fidelity Bank Building, Durham, North Carolina,
Attorneys for Appellants.

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STATEMENT OF FACTS.

The preamble of the Court's order is forcible on the the question of laches, if the Court should stop there, but when the Court investigates the facts alleged in the complaint, the scene will change, and the Court's mind will conceive from the face of the record a gigantic fraud practiced upon the Court, as well as on the heirs of Mark Hopkins, that should be corrected even though 64 years has elapsed.

It is admitted that 64 years has elapsed since the signing of the purported decree. It is also admitted that the original records in the probate proceedings were destroyed by fire in 1906, which is one of the vital reasons of the delay in the commencement of this action, but the necessary records in the case

upon which the plaintiffs and defendants must rely were recorded elsewhere in the state, and the plaintiffs have furnished the defendants copies attached to the complaint.

It is also admitted that the lips of those charged with fraud are closed in death, but they left foot prints in the sands of time, of their fraudulent acts which have lived after them, a fraud that was purposely wrapped in secret and kept from the heirs who lived three thousand miles from the scene of action, and who were handicapped in their investigation by the death of the parties and the destruction of the records, this fraud was conceived and planned, and runs through the entire administration of the estate, as the records disclose.

It is admitted, that the property has passed into the hands of others, this brings us to the vital question, who should suffer, the parties who have been victimized by reason of the fraudulent acts of those who knowingly perpetrated the fraud on the brothers and sisters of Mark Hopkins, and their descendants, or those who came into possession of the property in the face of the records with constructive notice such as the decree of distribution which was recorded in every county in the state where the deceased had property. (Ex. A.)

As well as the deeds on record that did not convey title out of the estate, the deed from Moses and Samuel to Mary Francis, attempting to convey all their interest while she was acting in a fiduciary

capacity as administratrix, that is void on its face. (Ex. B.) And the deed from Mary Francis, Moses and Samuel to Huntington, et al., also executed during the purported administration of Mary Francis, signed by her individually and without an order or confirmation of the Court, and before the debts of administration were paid. (Ex. C.) And the same thing as to the deed to the Ione Coal and Iron Co. (Ex. D.) These documents were recorded and notice to the world. Time even 64 years under the circumstances and facts alleged in the complaint, should not be permitted to defeat the rights of the plaintiffs, and the greatest fraud ever perpetrated in the State, should not be condoned by the Courts.

We state briefly the history of the probate proceedings. Mark Hopkins died intestate the 29th day of March, 1878, leaving eight brothers and sisters, seven of whom lived in North Carolina. Moses was the only heir living in California.

Mary Francis Sherwood, who claimed to be the wife of the deceased, which the complaint alleges is not true (Paragraph 19, Subsec. "W" of Complaint), made application and was appointed administratrix of the estate, on/or about the third day of June, 1878.

On March 13, 1880, Samuel F. Hopkins, in no way related to Mark Hopkins and Moses Hopkins executed a purported deed (Ex. B) to Mary Francis Sherwood Hopkins, which contained the following description: "All of their right, title and interest to and in all real estate of which the said Mark Hop-

kins died, seized and possessed, situated, lying and being within the State of California, the interest of each of said parties of the first part in said real estate being one undivided eighth part." (Complaint Ex. C.)

On April 5, 1879, and prior to the execution of the above deed, Samuel F. Hopkins of St. Clair, Michigan, in no way related to Mark Hopkins, Moses Hopkins of Sutter County, and Mary Francis Sherwood Hopkins, being the purported wife and brother of Mark Hopkins, executed a purported deed to Collis P. Huntington et al., attempting to convey the real estate and personal property of Mark Hopkins, deceased, in the business property and assets of the late firm of Huntington and Hopkins & Co., a partnership, the consideration one dollar. (Compaint Ex. D.)

On January 16, 1880, and prior to the execution of the deed from Moses and Samuel to Mary Francis above referred to, Mary Francis, Moses and said Samuel joined in a deed executed by Ellen Colton, et al., to the Ione Coal and Iron Co. (Ex. D) attempting to convey 48,000 acres of land. All the above conveyances were made during the administration of the said Mary Francis Sherwood Hopkins, and were signed individually and without an order or confirmation of the Probate Court, as shown on the face of the deeds.

That on the 26th day of August, 1881, the letters of administration of the said Mary Francis Sher-

wood Hopkins were revoked, and Moses Hopkins applied for letters and was appointed administrator. The decree shows on its face that neither of these parties furnished the clerk of the Court with the names and addresses of the heirs as required by law, paragraphs 14-15-16 and 17 of the complaint.

That a purported decree was signed by the Court November 1, 1883, and prior thereto Moses Hopkins filed a purported report in the Probate Court, and petition for distribution, in which he failed to report all the assets of the estate in his hands but reported only a fractional part of the assets. In fact the property returned to the Court was not in existence at the time. (Paragraph 19, Subsec. F.) Paragraph 19, subsection G sets out $24,940,592.29 of the personal property unreported, unaccounted for and undistributed as shown by the inventory filed in the Probate Court on or about May 5, 1878, by A. J. Briant, R. B. Redding and E. J. Miller, Jr., appraisers of the estate appointed by the Court as alleged in complaint. (Paragraph 19, Subsec. K.)

Paragraph 19, subsection M, alleges part of the scheme and fraud relied on by the plaintiffs.

That in the early eighties some of the relatives learned of the death of their relative Mark Hopkins, and communicated with Moses Hopkins, and were advised that Mark Hopkins had died and left a wife and nine children and had left a will. This information misled the heirs and lulled them to a state of quiescence. (Paragraphs 21 and 22.)

While some of the heirs knew of the death of Mark Hopkins, owing to the fact that the records were destroyed in the Court where the estate was administered, none of them discovered the facts constituting the frauds and concealment of the facts until 1945. (Paragraph 26 of Complaint.)

The heirs lived three thousand miles from the scene of action. (Paragraph 23.)

Mary Francis represented herself to be the wife and Samuel to be the brother of Mark Hopkins which the complaint alleges is not true. (Paragraph 19, Subsec. E and Paragraph 24.)

Mary Francis by the terms of the decree received all of the real estate and three-fourths of the assets of the estate. (Complaint Ex. A.) If she was the wife of Mark Hopkins, she was only entitled to one-half.

It is further alleged in the complaint as amended that Moses Hopkins, who administered the estate, had been convicted of an infamous crime, to-wit, grand larceny. (Complaint Paragraph 16.)

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1. THE COURT ERRED IN ADMITTING OVER PLAINTIFFS' OBJECTION THE AFFIDAVIT OF ROYAL E. HANDLOS AND EXHIBITS THERETO ATTACHED.

FEDERAL RULES OF CIVIL PROCEDURE.

Limitations and laches under the rules of the Court in force when this action was commenced and when the motion was made and decided were matters of

defense and had to be pleaded unless it appeared on the face of the complaint.

McConville v. District of Columbia, 26 Fed. Supp. 295.

"Motions to dismiss under the Federal rules is essentially the same as demurrer in early equity practice and such actions should be overruled where it brought in matters not alleged or appearing in the complaint."

Citing:

Moo v. Distilling Co., 49 Fed. Supp. 295.

Halmberg v. Hanaford, 28 Fed. Supp. 216.

"The defense of laches and limitations should be raised by an answer affirmatively setting forth the claims in these respects, rather than by motion to dismiss."

Rule 12 of the Federal rules of civil procedure, had not been amended when the present action was commenced and motion made, submitted and decided. The amended rules applying to the admission of the affidavit and documents in question and under which the Court admitted the evidence were not in force and effect when the evidence was admitted over the objections of the plaintiffs, and the case decided. The amended rules were not submitted to Congress for ratification until the convening of the 80th Congress, January, 1948, and did not become effective until the close of the session, or six months after ratification.

See Act of June 19, 1934, Chap. 651, U.S.C. Title 28, 723b, 723c.

SPEAKING MOTIONS AND DEMURRERS.

This appeal is based on the question of laches, the affidavit and exhibits thereto attached, dehors and controverts the facts alleged in the complaint, and might be termed a speaking motion, if there is such a thing in civil procedure, and is never held good.

Gallup v. Coldwell, 120 Fed. (2d) 90.

"Speaking demurrer is one which in order to sustain itself, requires the aid of a fact not appearing on the face of the pleadings objected to, or in other words, which alleges or assumes the existence of a fact not already pleaded, and which constitute the ground of objection."

Mortensen v. Frederickson Bros., 180 N.W. 977, 1 Syl.

"A demurrer raises only questions appearing from the face of the petition, and cannot be treated as a speaking demurrer, that is, a demurrer which introduces some new facts or averments, which is necessary to support the demurrer and which does not appear distinctly upon the face of the petition. A demurrer to a petition admits the verity of the facts well pleaded."

United States v. Forbes, 259 Fed. 585-593.

"A demurrer which sets up a ground dehors the record, or a ground which, to be sustained, requires reference to facts not appearing upon the face of the pleadings thus attacked, is said to be a speaking demurrer, and is never held good."

Brick Co. v. Gentry, 132 S.E. 800-804.

"A demurrer can be sustained, and it is only appropriate when the defects or objections appear on the face of the pleadings, as it is not the province of a demurrer to state objections not apparent on the face of the pleadings to which it is directed.

A speaking demurrer, as styled by the books, is one which invokes the aid of a fact, not appearing on the face of the complaint, in order to sustain itself, and is condemned, both by common law and by code system of pleadings."

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2. THE COURT ERRED IN GRANTING THE DEFENDANT'S MOTION TO DISMISS.

In that the Court failed to find any facts germane to the facts alleged in the complaint upon which to base its conclusions of law.

Carrell v. Hotel Co., 149 Fed. (2d) 404.

"A complaint should not be dismissed unless it appears certain the plaintiff is not entitled to relief under any state of facts which could be proved regardless how likely it may seem plaintiff will be able to prove his case. Ordinarily on a defendant's motion to dismiss court may consider only allegations of complaint which alone are taken as true."

It is frankly admitted that "the complaint does not allege that the ancestors *knew* the facts during their lifetime, or that they had *knowledge* of the falsity of the true facts," and that intrinsic fraud

does not avail plaintiffs, as stated by Judge Lemmon in his order of dismissal. Neither of these findings come within the purview of the facts alleged in the complaint. On the other hand the complaint alleges THEY DID NOT KNOW THE FACTS, AND PLAINTIFFS RELY ON EXTRINSIC FRAUD, and the facts alleged in the complaint do constitute extrinsic fraud. The complaint does allege facts, which are uncontroverted, showing that the purported appointment of Moses Hopkins as administrator was void by reason of his having been previously convicted of an infamous crime.

Also that the deeds set out in the complaint (Ex. B, C, D) and the purported decree of distribution set out in the complaint (Ex. A) are void on their face, and a void order or judgment may be attacked at any time or place.

Also, the complaint on its face shows that the purported decree of distribution is only a partial distribution of the estate of Mark Hopkins, had upon the petition of the purported administrator and such decree was void upon its face, for the reason that the law at the date of the purported distribution did not permit the administrator to petition for partial distribution. A void order, judgment or document may be attacked at any time and any place. The doctrine of laches does not apply to an action to establish the invalidity of such order, judgment or document, all of which is hereinafter more fully shown.

STATEMENT OF LAW.

It is a well settled principal of law, that laches does not run against a void instrument, or one secured where the Court does not have the power to render same, and in any event, does not begin to run until the parties have full knowledge of the facts, and if fraud is concealed so as not to come to the knowledge of the party injured. The allegations in the complaint fully meet these requirements.

Laches is a defense that should be pleaded, unless the complaint shows laches on its face.

Time alone does not constitute laches, there must be negligence or inactivity on the part of the plaintiff after full knowledge of the facts.

The Court in its supplemental order drew a very fine distinction in passing on paragraph 19, subsection M, page 13, line 20, and paragraph 18, in which plaintiffs allege that the plaintiffs or their ancestors never knew of the fraudulent acts of said administrator. The Court says: "That is not an allegation that they did not discover it."

Webster gives the meaning of the word "never" as, not ever: at any time: in no degree: not at all: never more: at no future time. The plaintiffs meant just what they said, the plaintiffs' ancestors never knew about the fraud, and according to the allegations in the complaint in paragraph 19, subsection M, page 13, and the findings of facts in Court's order dismissing the case, the plaintiffs never discovered the fraud until 1945, as alleged.

THE DOCTRINE OF LACHES HAS NO APPLICATION TO THE FACTS ALLEGED IN THE COMPLAINT.

The Court in its order dismissing the action states: "64 years elapsed between the entry of the decree of distribution attacked herein and the commencement of this action. The records in the probate proceedings were destroyed in the San Francisco fire in 1906." These facts appear in the complaint.

"Memories of living witnesses are dimmed through the passage of time and the property here involved has passed to other hands. Under these circumstances, plaintiffs must allege facts which negative laches. Plaintiffs allege discovery by them of the facts first in 1945." There is no averment as to whether their ancestors or any of them knew the facts during their lifetimes. If an ancestor's right was barred it did not revive. It is not alleged that none of the relatives of the deceased had knowledge of the falsity or of the true facts.

The foregoing facts except those alleging that the records were destroyed by fire in 1906 which is alleged in paragraphs 18 and 29 of the complaint are not alleged in the complaint and there is no allegation in the complaint from which such an inference can be drawn.

It is apparent therefrom that the Court bases its finding of laches on the ground that 64 years elapsed between the entry of the decree of distribution attacked herein and the commencement of this action.

The finding of the Court that 64 years has elapsed is not sufficient to sustain a finding of laches. The mere lapse of time does not constitute laches. Full knowledge of all the facts concurring with a delay for unreasonable length of time are the essential elements of the defense of laches, and laches does not begin to run until knowledge is shown to exist.

Arles v. Vehalam Coal Co., 96 Pac. 528, 535, 52 Oregon 70.

RESTATEMENT OF THE LAW OF RESTITUTION ADOPTED BY THE AMERICAN LAW INSTITUTE, ON THE SUBJECT OF LACHES.

Chapter 8, Section 148, commencing on page 589, subsection 1, treats this subject fully, and is in accord with all the authorities herein cited on the subject of laches.

Briggs v. Buzzall, 204 N.W. 548, 549, 164 Minn. 116.

"Inactivity when it is not blamable, is not laches. No one can be charged with negligence in the assertion of his rights as will bar one from obtaining equitable relief. The pith of the doctrine of laches is unreasonable delay in enforcing a *known right.*" (Emphasis ours.)

Kessler and Co. v. Ensley Co., 129 Fed. 307. "Inactivity when it is not blamable is not laches. No one can be charged with negligence in the assertion of his rights *unless he knew them. There is no such thing as acquiescence in a wrong, un-*

less there is notice or knowledge of that wrong." (Emphasis ours.)

Gicarach v. Ruff, 164 A. 465, 468, 112 N. J. Equity 296.

"Laches does not exist where one is ignorant of his own culpable negligence."

In

Standard Oil of Colorado v. Standard Oil Company, 72 Fed. (2d) 524, 527,

the Court said:

"Laches cannot be imputed to one who has been justifiably ignorant of facts creating his cause of action."

Curl v. Vance, 181 S. E. 412, 416, 116 W. Va. 419.

"Lapse of time alone does not constitute laches."

In re Braver, 51 Fed. (2d) 123, 125;

Fidelity and Deposit Co. of Maryland v. Farmers Bank of Bates County, 44 Fed. (2d) 11, 19;

McGuire v. Hibernia Savings and Loan Assn., 23 Cal. (2d) 719, 146 Pac. (2d) 673, 681.

"Laches does not result from mere passage of time."

McGuire v. Hibernia Savings and Loan Assn., 23 Cal. (2d) 719, 146 Pac. (2d) 673, 681,

citing

Toomey v. Toomey, 13 Cal. (2d) 317, 89 Pac. (2d) 634.

Williams v. Stillwell, 217 Cal. 489, 19 Pac. (2d) 773;

Clarke v. Walker, 25 Ten. App. 78, 150 S.W. (2d) 1082;

Miller v. Ash, 156 Cal. 544, 105 Pac. 600.

"The fact determination of the controversy involves an investigation of rights originating many years past does not render the claim stale."

10 *Cal. Jur.* 528, Sec. 66, says:

"One of the principal factors in determining laches is acquiescence. But acquiescence, to be significant must be based on knowledge; that is to say—a full knowledge of the facts. Acquiescence to constitute laches, must be with the knowledge of the wrongful acts themselves and of their injurious consequences, it must be voluntary, not the result of accident, nor of causes rendering it a physical, legal, or moral necessity."

Broderick's Will, 83 U. S. 503:

"If fraud is kept concealed so as not to come to the party injured he will not be charged with laches."

Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077:

"Though the conduct of a trustee amounted to a repudiation of the trust, such repudiation cannot set in motion the statute of limitations, nor raise the bar of laches, unless it was unequivocally brought to the knowledge of the beneficiary,".

APPOINTMENT OF MOSES HOPKINS VOID.

In the appointment of Moses Hopkins, administrator, the Court exceeded its jurisdiction.

This principle of law has been upheld by the text writers, the Federal, and State Courts that have a statute similar to Section 1359, Code of Civil Procedure of California in effect in 1878 and in force at the time of the purported appointment of Moses Hopkins as administrator and is now Sections 401 and 420 of the Probate Code of California. Section 1369, Code of Civil Procedure, 1878 and 1881—at the time of the appointment of Moses Hopkins as such administrator read as follows:

"Who are incompetent to act as Administrators.

1. No person is competent or entitled to serve as administrator or administratrix, who is under the age of majority.

2. Not a bona fide resident of the state.

3. Convicted of an infamous crime.

4. Adjudged by the Court incompetent to execute the duties by reason of drunkenness, improvidence, or want of understanding or integrity."

North Carolina has a similar statute as follows (Chapter 28, Section 8, Volume 2, North Carolina Code):

"Administration.

Disqualification enumerated. The clerk shall not issue letter of administration or letters testamentary to any person who, at the time of appearing to qualify

1. Is under the age of 21 years.

2. Is a nonresident of the state; but a nonresident may qualify as Executor.

3. Has been convicted of a felony.

4. Is adjudged by the clerk to be incompetent, to execute the duties of the Trust.

5. Fails to take oath or give bond.

6. Has renounced his right to qualify.

Chapter No. 14, Section No. 8, page 644. Larceny of horses or mules. If any person shall steal any horse, mare, gelding, or mule, he shall suffer imprisonment at hard labor for not less than one or more than twenty years at the discretion of the court. A count under this section may be joined in a bill of indictment with a count under § 14-82."

The complaint alleges that the decree is void, and that the appointment of Moses Hopkins administrator is void by reason of his having been convicted of an infamous crime, to-wit, grand larceny.

Freeman on Judgments, 4th ed., Sec. 117, says:

"A void judgment is, in legal effect no judgment, by it no rights are diverted, from it no rights can be obtained, worthless in itself, all proceedings founded on it are equally worthless, it neither bars or binds anyone, all acts performed under it and all claims growing out of it are void."

Citing

Kellan Estate, 63 A.L.R. at page 105.

In *American Jur.,* Vol. 21, page 439, it is said:

"Although the conclusive effect of a judgment of probate and other Courts exercising similar powers upon all matters within their jurisdiction is generally maintained in the several states, yet if a Probate Court having jurisdiction over certain subject matter clearly exceeds its powers, or does acts prohibited by law, its decree may be avoided in a collateral proceeding as well as by an appeal".

At page 460, Sec. 128:

"In case where the Court granting letters of administration has no jurisdiction the courts have generally held the acts done by such administrator, absolutely void, IRRESPECTIVE OF LAPSE OF TIME".

At page 451:

"In some jurisdictions, the view prevails that the appointment of an ineligible person as administrator is void, and in consequence his acts in an official capacity are also void."

Citing 14 A.L.R. 622.

In *Scott v. McNeal,* 154 U. S. 34, the Court said:

"An appointment of an administrator of a living person though he has been absent 7 years and presumed dead is void. Because the court had no authority to make the appointment."

At page 45:

"Taking property under such circumstances was without due process of law, in violation of the 14th amendment of the United States Constitution."

At page 50:

> "In a case decided in the District Court of the United States for the Southern District of New York, in 1880, above cited, Judge Chote, in a learned and able opinion, held that letters of administration upon the estate of a living man, issued by the Surrogate after judicially determining that he was dead, were null and void as against him, that the payment of a debt to an administrator so appointed was no defense to an action by him against the debtor; and that to hold such administration to be valid against him would deprive him of his property without due process of law, within the meaning of the 14th amendment of the United States constitution."

In *Knox v. Nobles,* 28 N. W. Supp. 355, 27 N. Y. Supp. 206 an action to set aside an attempted sale made by the administratrix of her husband's estate, the Court said:

> "The main question involved upon this appeal, is whether letters of administration issued by the Surrogate to a minor are or are not void.
>
> "The Statute expressly prohibits the granting of letters to a person convicted of an infamous crime, or to one incapable of making a contract, or to a person under the age of 21 years. Can it be said that the Surrogate by his ipse dixit, can repeal the statute, it being manifest that the question of the eligibility of the person proposed to be appointed administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that a judicial officer can by his mere will override the express prohibition of the statute."

"The right of the Surrogate in the case at bar to appoint an administrator could not be attacked collaterally, but when he selects a person whom the statute says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void. A decree granting letters of administration to an infant is void, and may be attacked on that ground in a collateral proceedings.

"It seems therefore, reasonably clear that the appointment by the Surrogate of the plaintiff was void, and that the contract, as far as the plaintiff attempting to bind the estate of her husband was also void. But it is a familiar principle that a person attempting to enter into a contract in a representative capacity having no authority to enter into such contract in such capacity, is bound individually." (Citing authorities.)

In *Continental Trust Co. v. Noble,* 30 N. Y. Supp. 994, the Court said:

"Since the decision of the general terms of this Court in Knox v. Noble, in which the validity of the appointment of the intestate's widow as administratrix was in question, it is settled that the act of the Surrogate in issuing letters to the widow was void, as she was then a minor, and that any contract made by her as administratrix, so far as it attempted to bind the estate of her husband, was also void.

"The letters that the Surrogate Court issued which attempted to appoint testator's widow as administratrix being void, there was no representative of the estate, with whom the defendant could deal, or make any contract that would bind

> the estate. The bill of sale that he received from the widow was therefore an absolute nullity, so far as the estate was concerned; and the plaintiff, having been duly appointed administrator and being in position to enforce the right and obligations of the estate, is clearly entitled to require the defendant, as surviving partner to account for the co-partnership property in his hands."

In re Martin Estate, 31 Cal. App. (2d) 680, 88 Pac. (2d) 755: In this case, the heirs of Martin brought suit to recover an estate that had been ordered by the Court escheated to the State. The Court said that the Probate Court had exceeded its jurisdiction, and that the decree was void. The Court further stated:

> "It is our opinion that * * * the Court had no power or jurisdiction to distribute the estate to the State of California. Such a decree, in excess of jurisdiction, is void. 'Excess of jurisdiction, as distinguished from the entire absence of jurisdiction, means that the act, although within the general power of the judge, is not authorized and therefore void, with respect to the particular case, because the conditions which alone authorize the exercise of his general power in that particular case are wanting and hence, the judicial power is not in fact lawfully invoked.'" Citing 15 C. J. p. 729, par. 24.

In *Shipman v. Butterfield,* 47 Mich 487, 11 N. W. 283, it was held that an appointment of an administrator prohibited by statute is void, and may be set aside as a cloud on the title.

In *Hong v. Primean,* 98 Mich. 91, 57 N.W. 25, where a son named in the will as executor had been convicted in New York of the crime of forgery in the first degree, which was punishable by imprisonment in the State prison, he was a felon within the statute disqualifying a felon from acting as executor, and hence was ineligible to act as such.

In the *Estate of Agoure,* 165 Cal. 142, 132 Pac. 587, the widow of the deceased had applied for letters of administration. A creditor interposed with a contest and petition for letters. The petition charged the widow with having entered into a conspiracy to murder her husband. The Court said that the petitioner knew or should have known, that Section 1409 of the Civil Code declares that "no person who has been convicted of murder of the deceased shall be entitled to succeed to any portion of his estate" and that Section 1350 of the Code of Civil Procedure declares that no person is competent to serve as executor or administrator who has been convicted of an infamous crime. The Court held that the petition was without merit.

The question of the validity of the acts of an administrator arises in two classes of cases: those in which the appointment is absolutely void, in which case the acts of the administrator are a nullity, forming one class; and cases wherein the appointment was merely voidable, in which case acts done in good faith prior to the revocation of, and pursuant to the power granted by the letters, have, in gen-

eral, been considered valid and binding upon the estate, forming the second class. See Appointment Void.

Carr v. Illinois C. R. Co., 43 L.R.A. (N.S.) 634-635.

Where the Court has no jurisdiction, its proceedings are absolutely void.

State v. Richmond, 26 N.H. 239;

Tebbetts v. Tilton, 31 N.H. 273;

Sigourney v. Sibley, 21 Pick. 101, 32 Am. Dec. 248;

Morgan v. Dodge, 44 N.H. 255, 82 Am. Dec. 313.

The power of a Court to grant letters of administration in any case, will depend upon the facts as they existed at the time the letters were granted; and if the Court had not the power to grant letters of administration, none of the proceedings, in the course of the administration, will have any validity in favor of any person on the ground that such person was ignorant of the want of power in the Court to grant the letters of administration.

Withers v. Patterson, 27 Tex. 491; 86 Am. Dec. 643.

In *Hinkle v. Eichelberger,* 2 Pa. 483, the Court stated that where an administration is originally void, all acts done under it are void.

The principles of law in the above cases apply to the case at bar. If the administrator Moses Hopkins was not eligible by reason of the allegations alleged in the amended complaint, the Court had no authority to appoint him under the statute, and the Court did

not acquire jurisdiction of the person or the property, and could not by any order, vest title in the administrator, and did not by any order, invest him with the character or powers of an administrator.

The Court further states in its opinion and order dismissing this action, "There is no averment as to whether their ancestors or any of them knew the facts during their lifetime. If an ancestor's right was barred it did not revive. It is not alleged that none of the relatives of the decedent living at the time of the administration of the estate had knowledge of the falsity or of the true facts." Appellants concede that if plaintiffs' ancestors' right was barred it does not revive; "and that it is not alleged in the complaint that none of the relatives of the deceased had knowledge of the falsity or of the true facts." If any of the relatives of the decedent living at the time of the administration of the estate had knowledge of the falsity or of the true facts, then this action would not have been commenced. On the contrary, however, it is alleged in the complaint who the ancestors of the plaintiffs were (Par. 14, page 4 of the complaint); "That at the time of the filing by Mary Francis Hopkins of her application for letters of administration said applicant well knew the names and addresses of the true and lawful heirs of said decedent; that said applicant wilfully, knowingly, and with intent to defraud said lawful heirs and to deceive the honorable Superior Court concealed from said Court and from the clerk thereof the names and addresses of said brothers and sisters of said Mark

Hopkins, except only Moses Hopkins; that by reason of said fraud of said applicant the clerk of said Court failed to mail to said heirs, except Moses Hopkins, notice of said hearing or notice of the time and place of said hearing, and that the said heirs other than Moses Hopkins, received no notice thereof, either directly or indirectly, and said heirs never knew of said hearing." (Par. 15, pages 4 and 5 of the Complaint.)

(Par. 16, page 5 of the Complaint):

"It is alleged in the complaint that thereafter the purported letters of administration issued to Mary Francis Sherwood Hopkins were revoked on or about the 26th day of August, 1881, and that immediately thereafter Moses Hopkins applied for letters of administration in said Court and was granted purported letters of administration."

(Par. 17, page 5):

"It is further alleged that at the time of filing his application for letters Moses Hopkins well knew the names and addresses of his four brothers and three sisters named in Par. 14, page 4 of the complaint. But knowingly and wilfully, and with intent to defraud and deceive concealed from the court and from the clerk thereof the names and addresses of said legal heirs; that by reason of said fraud of said applicant upon the court and clerk and said heirs, the clerk of said court failed to mail to said heirs notice of said hearing or the time and place of said hearing, and the said heirs received no notice thereof, directly or indirectly and never knew of said hearing

and that no notice was given to them as required by law."

(Par. 18, page 6):

"The complaint further alleges that pursuant to said purported letters of administration, Moses Hopkins administered said estate and applied to said court for a decree of settlement of account and distribution of said estate, that plaintiffs and other legal heirs of the estate of Mark Hopkins, or their ancestors did not receive, and none of them did receive any notice of said account and final distribution, or of the time and place of hearing thereof, as is shown on the face of the decree; and never knew of said hearing of said account and petition for distribution and never knew that said purported decree of distribution had been ordered or made or entered."

(Par. 19, commencing with line 20, p. 13, down to and including the word "Administrator" in line 26):

"That at and during the whole period of probate of said estate the brothers and sisters, the heirs of the deceased other than Moses Hopkins, were not residents of the State of California, and were absent therefrom, and that none of them had any notice or knowledge and never knew of the aforesaid false and fraudulent acts of said administrator."

(Par. 22, pages 14 and 15):

"It is further alleged that in the early eighties one Zebedee Russell, a relative of Mark Hopkins, had information that Mark Hopkins had died, and

on receiving such information said relative wrote to Moses Hopkins requesting information as to the death of Mark Hopkins and as to his estate; that said Zebedee Russell received a reply from said Moses Hopkins that he had willed all of his estate to him, the said Moses Hopkins."

"That said information coming from Moses Hopkins who occupied a fiduciary relation with said heirs was by them believed; that said heirs had no occasion even to suspect that the statements contained in said letters were not true as to the wife and nine children, and had died leaving a will, believed and relied on said statements and were lulled to sleep and abandoned the idea of making further investigation of said estate until years later when they discovered said statements were false and made for the purpose of deceiving the heirs at law, and the heirs were thereby deceived. That in 1945 upon discovery that said statements were false, the legal heirs of Mark Hopkins immediately employed counsel and proceeded to unfold the secret schemes, fraud, and misrepresentations by and between Mary Frances Sherwood and Moses Hopkins, and to assert their rights in and to said estate."

(Par. 26, p. 16):

"That Plaintiffs are informed, believe and allege on information and belief that the said Mary Frances Sherwood-Hopkins was never married to the late Mark Hopkins and was not his wife; but as the Plaintiffs are informed, believe and allege on information and belief, was the housekeeper in the home of Mark Hopkins and his kindred in North Carolina. That in order to perpetrate the

scheme to defraud the legal heirs of Mark Hopkins, to-wit, brothers and sisters in North Carolina, Moses Hopkins entered into the scheme and an agreement with the said Mary Frances Sherwood-Hopkins to the effect that he would give her three-fourths of said estate. That Mary Frances Sherwood-Hopkins did aid and abet Moses Hopkins in said fraudulent scheme and entered into the said unlawful agreement upon which the decree of distribution of the Court was based, as aforesaid, by suppressing and concealing from the Court the facts relative to the heirship and rights of the heirs of Mark Hopkins; that by reason of the said acts of Moses Hopkins and Mary Frances Sherwood-Hopkins, a fraud was practiced upon the Court and upon the Plaintiffs and their ancestors. These facts were not discovered by the Plaintiffs or their predecessors, heirs of Mark Hopkins, or by any of them until September, 1945."

(Note: This paragraph also rebuts the findings in the Court's memorandum and order of June 17, 1948.)

(Par. 28, p. 17):

"That the said fraudulent acts of Mary Frances Sherwood-Hopkins in fraudulently representing herself to be the wife of the said Mark Hopkins were not discovered by the Plaintiffs or their predecessors or by any of them until 1945, when Plaintiffs discovered that she was only the housekeeper in the home of Mark Hopkins."

(Par. 29, p. 17, beginning with line 43):

"That by chance in August in 1945, the Plaintiffs after long research discovered the deed, above re-

ferred to, recorded in the County of Sacramento from Mary Frances Sherwood, Samuel and Moses Hopkins, to Huntington, et al., that threw some light on the estate, and in 1945, a deed was discovered in Stockton, San Joaquin County, with other facts pertaining to said estate, and in 1945 the Plaintiffs discovered in Kern County other information pertaining to said estate, and a purported copy of the inventory filed in said estate was discovered by plaintiffs in the Hall of History in 1947."

The Court in his order of dismissal further states:

"It is also very questionable whether there is a sufficient explanation why the facts could not have been discovered by either the ancestors or plaintiffs during the long interval."

The Court apparently did not base its order of dismissal upon this ground, as it did not hold that there was not a sufficient explanation why the facts could not have been discovered by either the ancestors or plaintiffs during this long interval. However, the complaint does give an explanation why the facts were not and could not have been discovered by either the ancestors or plaintiffs prior to 1945.

(See Pars. 22, 23 and 29 of the Complaint.)

Investigation Prevented or Difficult—Vol. 12, *Cal. Jur.*, p. 762, Sec. 36.

"A party may be excused from investigation where he is prevented, by false and fraudulent representations as to material facts, from seeking the information which he does not possess,

and which, but for such misrepresentations, he might obtain. And although an examination is made, relief will still be afforded if means are used to prevent a complete investigation. Where, for example, one is induced to sign an instrument by false statements as to its contents, made with intent to mislead and to prevent him from making an examination of its provisions, it is no answer to say that a higher degree of care would have enabled him to escape its effect. And where, by artifice, a vendor prevents the purchaser's investigation from being as full as he desires to make it, relief may be awarded. Similarly, a seller of chattels is not at liberty to hinder or obstruct the purchaser in his attempts to find out defects or blemishes, although he may be under no obligation to point them out. A grantee is not permitted, however, to plead ignorance of the covenants of a deed delivered to him, after it has been accepted and recorded, as a ground for defeating the force and effect of such covenants, where there is no evidence that the grantor in any way prevented a personal inspection of the contents of the deed."

"Investigation may be excused also where distance from the object of the transaction, or some similar cause, renders examination extremely difficult. This rule, however, is not applied indiscriminately, and the fact that property is at a distance does not always excuse an investigation."

Circumstances Excusing Investigation—Vol. 12, *Cal. Jur.*, Sec. 34, page 758:

" 'Every contracting party has an absolute right to rely on the express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the basis of a mutual agreement; and he is under no obligation to investigate and verify statements to the truth of which the other party to the contract, with full means of knowledge, has deliberately pledged his faith.' The party making the representation cannot escape responsibility by showing that the other party might have ascertained that such representation was untrue, or had no right to believe it. Where one is justified in relying, and in fact does rely, upon false representations, his right of action is not destroyed because means of knowledge were open to him. In such a case, no duty rests upon him to employ such means of knowledge, even though by reason thereof, in the absence of any representation at all, a constructive notice would be inferred. The doctrine of constructive notice does not apply where there has been such a representation of fact. If the representation is of a character to induce action and does induce it, that is enough. It matters not that a person misled may be, in some loose sense, negligent, for it is said not to be just that a man who deceives another should be permitted to say to him. 'You ought not to believe or trust me,' or 'You are yourself guilty of negligence'."

In its order of April 27, 1948, the Court states: "The averments of intrinsic fraud do not avail plaintiffs."

Plaintiffs do not rely upon intrinsic fraud.

Plaintiffs in their complaint make averments that clearly show that the fraud committed upon the Court and heirs of Mark Hopkins is not intrinsic in its nature but comes well within the law defining *Extrinsic Fraud.*

THE DECREE THAT IS MADE A PART OF THE COMPLAINT EX. A, PAGE 36, IS VOID

In that Mary Frances Sherwood-Hopkins in filing application for letters knew the names and addresses of the brothers and sisters of the deceased, and failed to disclose them to the Court or the clerk thereof as required by law—wilfully, knowingly, with intent to defraud the lawful heir and to deceive the Court, as alleged in the Complaint, Paragraph 15, page 4 of Complaint, that Moses Hopkins in filing his petition for letters, well knew the names and addresses of his brothers and sisters and failed to disclose them to the Court or the clerk thereof and by reason thereof the clerk failed to notify said heirs. That said acts were done or omitted with intent to conceal the facts and deceive and defraud the Court and the heirs of Mark Hopkins as alleged in Paragraph 17, page 5 of the Complaint.

That said facts are shown on the face of the decree in that it is stated in paragraph 3 of the decree: "That Mary Francis Sherwood-Hopkins is the only person interested in said estate except the administrator."

The failure of the administratrix and the administrator to furnish the Court or the clerk the names and addresses of the heirs was extrinsic fraud upon the Court and the heir, which is shown on the face of the decree in which it stated:

> "And Mrs. Mary Francis Sherwood-Hopkins the only person interested in said estate except said administrator having filed her consent in writing that said account may be settled and allowed." (See Complaint, page 36.)

Which deprived the Court of its jurisdictions and rendered the appointment and decree void.

Hill v. Laub, 116 Cal. 359.

Duncan v. Superior Court, 149 Cal. 98.

> "In 1878 it was necessary for the petitioner to give the names and addresses of all the heirs, if known and file character and estimated value of all the property to give the Court jurisdiction, then it became the duty of the clerk to notify all the heirs."

Pomeroy's Equity Jur., Vol. 2, page 1835, Sec. 886.

> "Where a party makes a statement which is untrue, and has at the time an actual positive knowledge of its untruth, and the necessarily resulting intent to deceive, this is the most direct, and in some respects the highest form of fraud."

RESTATEMENT OF LAW ON JUDGMENTS.

Chap. 2-"f", page 39.

"Opportunity to be heard, even though the court has jurisdiction over the defendant, and even though he is given notice of the action, a judgment against him is void, if he was denied all opportunity to be heard, notice to a defendant of the claim which is being made against him is of no value to him if he is denied an opportunity to defend the claim."

Sec. 142, Chap. 8-"c", page 573.

"If the recipient has been fraudulent or guilty of duress not only is a defense of change of circumstances barred by the fact that his conduct was tortious, but also because of his knowledge of the facts from which he had notice of the rights of the claimants to the subject matter."

The defendants having received the property described in the complaint with record notice of the facts alleged in the complaint are bound thereby.

THE DECREE IS VOID BY REASON OF THE FRAUD PRACTICED UPON THE COURT AND THE HEIRS.

Larabee v. Tracy, 39 Cal. App. (2d) 593.

"After holding that the facts that the party was misled and kept away from court, and no notice was given other than by publication," the Court said, at page 599: "In all these cases and many others which have been examined, relief has been

granted on the ground that by some fraud practiced directly upon the party seeking relief against the judgment or decree, that the party has been prevented from presenting his case to the Court. This definition has become the well recognized standard definition of extrinsic fraud."

EXTRINSIC FRAUD.

THE COMPLAINT ALLEGES FACTS ESTABLISHING EXTRINSIC FRAUD.

IT ALLEGES THAT MOSES HOPKINS, THE PURPORTED ADMINISTRATOR, IN FILING HIS REPORT, REPORTED ONLY A MINOR PORTION OF THE REAL AND PERSONAL PROPERTY OF THE ESTATE, BUT ON THE OTHER HAND REPORTED PROPERTY THAT WAS NOT IN EXISTENCE AT THE TIME, AS ALLEGED IN PARAGRAPH 19, subsections F and G, pages 7, 8, 9, 10 of the Complaint and failed to report millions of dollars belonging to the estate. In his possession at the time of filing of his report as alleged in complaint. This constituted extrinsic fraud.

Weyant v. Utah Savings and Trust Co., 182 Pac. 189.

See

Goodrich v. Ferris, 145 Fed. 844.

This is a case where a husband left his wife and children and married another woman, died, the purported wife was appointed administratrix and ad-

ministered on the estate. The wife and children brought suit to set it aside and upon the bond. At page 199 the Court said:

> "The administratrix so far as the respondent is concerned, acted directly contrary to and in the teeth of duty imposed by law and by the bond that is sued on. It was the duty of the administratrix under the law, to publish proper notice, so as to appraise the heirs, and all others interested in the estate of the true condition, and when she failed to do that she utterly failed to faithfully execute the duties of the trust according to law, nor did she administer the estate for the use and benefit of the heirs of the deceased as she was bound to do.
>
> Nor did the wrong committed by her occur after the decree of distribution nor when acting in a capacity other than that of administratrix, but while acting in said capacity.
>
> In the probate proceedings herein questioned, however, the administratrix not only failed to publish proper notice, but she utterly failed to make and return a true and complete inventory of the property belonging to the estate, she converted millions to her own use without reporting it to the court and without disclosing its existence.
>
> That act alone constituted an insufferable fraud and manifestly constituted a breach of trust."

See *Cyc.* Vol. 18, page 1267.

"Moreover all of her acts which resulted in despoiling respondents of their inheritance occurred during the administration of the estate."

Aldrich v. Barton, 138 Cal. 220, 71 Pac. 169. "In this case the plaintiff alleged that the trustee withheld funds and failed to report same to the court. That it was a fraud upon the court and the interested party. The court said the trustee took advantage of the absence of the cestui que trust to present a false and fraudulent petition to the court and have it acted upon without her knowledge, this was a fraud upon the court as well as upon the absent interested party, and this is held to be extrinsic fraud, which prevented the plaintiff from being properly represented at the hearing or from being represented at all."

Sohler v. Sohler, 135 Cal. 323, 62 Pac. 282. "Respondents, against the sufficiency of the complaint, urged by their demurrer that it is the exclusive province of the court in probate to determine heirship and decree distribution; that the complaint goes no further than to charge intrinsic fraud, in that Paul Reuss succeeded by false and perjured evidence in obtaining a favorable decision upon a matter essential to the proceeding, and one in which the court was bound to exercise its judgment; and that, notwithstanding that the decision was obtained by such evidence, this fact affords no ground for relief in equity. If this were all the complaint discloses, the respondents contention would be undoubtedly sound; for it is the general rule that intrinsic fraud—fraud by which a decree or judgment is obtained by false evidence upon issues within the case—is not such fraud as equity will relieve against; the theory being that the losing litigant has had his day in court, and that, while it must always remain a

misfortune that private causes shall be lost by forsworn testimony, yet stronger than this consideration is that which declares it to be the policy of the law to make an end of litigation, and in the nature of things, there never could be a final judgment if every judgment was open to avoidance upon the charge that fraudulent evidence had been introduced in its procurement. Therefore it is the general rule that extrinsic fraud only will form the basis of such relief as is here sought—extrinsic fraud consisting in the failure to give legal notice to the adversary, the prevention of his or her witnesses from attending the trial, and the like. But when we come to scan the allegations of this complaint, it will be discovered that there is more alleged than the mere procurement of this decree by false evidence. The executrix of the estate was not alone the trustee of all of the heirs of the estate, and all of the parties in interest thereto and thereunder. She was the mother of these minor plaintiffs, had their actual custody and control, and, as their natural guardian, was chargeable with all the high duties pertaining to that relationship. As executrix, merely, it might be argued that she was a disinterested party, having no concern whatsoever in question of heirship or right of distribution, standing indifferent between the parties, and interested only in carrying into effect the determination of the court upon these questions. But as the mother and natural guardian of these plaintiffs her position was a very different one. She was under most solemn obligation to protect the legal rights of her infant and dependent offspring.

She was under like obligation to disclose to the court on their behalf, and in their interest, all knowledge which she possessed, and she was under the same obligation to see that their legal claims to the estate were properly presented before the court in probate; and with peculiar force did this duty press upon her, in view of the fact that during all of this time she was executrix of and administered upon the estate through which her children were to derive their property. Such being her position, it is charged that in violation of this duty, and of the rights of her minor children, she connived with her adult son, not an heir to the estate of the deceased, to procure for him a distributive portion of that estate, and that the conspiracy was carried to a successful termination. Here, certainly, is a charge of concealment upon the part of the guardian when she should have spoken in the interest of her wards, and collusion upon the part of the guardian with another not in interest in the estate, to the end that that other might despoil the wards of their rightful inheritance. It cannot to this be answered that the probate proceeding upon distribution was not an adversary proceeding. It becomes adversary in every case where there are conflicting claims, and where there be not the most perfect understanding and harmony between the claimants. The moment heirship was set up by the false claimant, Reuss, that moment between him and the rightful heirs an adversary proceeding was at issue, and from that moment it became the duty of the guardian of these minor heirs to see that the fullest presentation of their claims was put before the court. This, by con-

spiracy with her codefendant, it is asserted, she did not do; and it is clear that her fraud in pushing on behalf of Reuss his false claim to heirship and distribution, and in concealing the truth from her own minor children, the rightful heirs, and in leaving them in ignorance that they were thus to be deprived of their patrimony, was fraud extrinsic to the case, which prevented their being properly represented at the case, or from being represented at all.

We conclude, therefore, that the complaint presents a bill for equitable relief. But for what kind of relief? The relief prayed for is that the court in equity should avoid so much of the decree as distributes the property to Paul Reuss, should decree that the plaintiffs are entitled to that property in equal shares, and should distribute it accordingly. The prayer for such relief derives support from the case of Baker v. O'Riordan, 65 Cal. 368, 4 Pac. 232. In that case a married woman, the owner of separate property in San Francisco, died while her husband was at sea. Her sister procured letters of administration upon the estate, and sought and obtained distribution upon a petition that her sister had conveyed the property to her in her lifetime by an unrecorded deed which was lost. The appearance of the absent husband was falsely entered by an authorized attorney. The trial court found all these facts, but withheld relief; and this court declared that the plaintiff was entitled to the relief sought, —the setting aside of the decree of distribution."

It is not true that the representations upon which plaintiffs would predicate fraud are alleged to have

been made in the early eighties, * * * It is true that the complaint avers certain letters referred to in paragraphs 21 and 22 received in the early eighties, these letters were false in their statements, and were an element of extrinsic fraud. Conceding for the sake of argument, that these letters were received after the decree became final, and if such be the case, they do not amount to actionable fraud. Nevertheless, they did act as an anaesthetic that lulled the brothers and sisters of Mark Hopkins and their descendants to sleep and caused them to abandon their investigation until later years, when they discovered the written words of Moses Hopkins were false, as alleged in the complaint.

Nevertheless, the fraud committed upon the Court and the ancestors of the plaintiffs by withholding and concealing from the Court the names and addresses of all the brothers and sisters of Mark Hopkins, and the concealment, and failure to report to the Court the major portion of the estate, and the failure to appraise the brothers and sisters of their rights and interest in the estate, is extrinsic fraud of the most vile and repugnant character, and is actionable. This fraud, it is alleged, was committed at the beginning and during the course of the probate proceedings.

THE DECREE WAS ONLY A PARTIAL DISTRIBUTION OF THE ESTATE AND WAS MADE UPON PETITION OF THE PURPORTED ADMINISTRATOR, AND VOID.

The complaint alleges the decree failed to distribute or mention the bulk of the estate in his hands and known to the administrator at the time, and the decree shows on its face that it failed to distribute the cash on hand. In that the cash on hand at the time was $895,894.01. The decree only distributed $895,078.01, leaving the sum of $816.00 undistributed and unaccounted for as shown on the face of the decree, also $24,940,592.29 personal property undistributed and unaccounted for. [Complaint, pp. 9 and 10.]

Paragraph 19, page 6, Subsection D, page 7 shows that the purported decree *was a decree of partial distribution,* in that it shows on its face that only a part of the estate accounted for was distributed; and that such partial distribution was on the petition of the administrator. That Section 1658 of the Code of Civil Procedure of California in effect at the time of such partial distribution did not authorize an administrator to petition for partial distribution and any order made pursuant to such petition was unauthorized and beyond the jurisdiction of the Court, there being no authority in the statute for the proceedings taken in the Court below, they were unauthorized, and should be set aside—*In re Letellier's Estate,* 74 Cal. 311, 15 Pac. 847.

In *Alcorn et al. v. Buschke,* 133 Cal. 655, 66 Pac. 15, the Court said:

> "As to the validity of the decree of distribution no argument is advanced by the respondent's counsel, or rather argument is expressly declined. But clearly the proceeding, which was on the petition of the administrator for partial distribution was without jurisdiction, and the judgment void. (158 Cal. 396.)"

In *Alcorn v. Giesecke,* 158 Cal. 396, 111 Pac. page 98, at page 101, the Court said:

> "It may equally be conceded that the decree of partial distribution was void because the court had no jurisdiction to entertain it by the petition of administrator, the statute only authorizing it on the part of the heirs, devisees or legatees."

It appearing on the face of the purported decree of distribution (Ex. A, p. 36) that the sum of $816.00 reported accounted for and in the hands of the administrator, is not distributed by the decree and is not disposed of by the omnibus clause, which omnibus clause only attempts to distribute the unknown property of the estate. The decree left the sum of $816.00 as shown by the account in the estate and therefore was only a decree for partial distribution and without the jurisdiction of the Court to make distribution on petition of the administrator.

THE COURT EXCEEDED ITS JURISDICTION.

In that it attempted to distribute three-quarters of the estate to Mary Francis Sherwood Hopkins, if she was the wife of the deceased, under the law she was

only entitled to one-half. This is shown on the face of the decree.

Under the law existing when the purported distribution was made, a wife was only entitled to one-half of the estate. In the instant case it appears from the decree that the Court attempted to distribute all the real estate and three-quarters of the personal property of the estate to the said Mary Francis Sherwood Hopkins.

Under Section 1658, Code of Civil Procedure, in effect at the time, a wife where there was no issue was entitled to only one-half of the estate. The decree purports to distribute three-fourths of the residue of the estate to the alleged widow. This is clearly in excess of the Court's jurisdiction, there being no law upon which such distribution could be made.

VOID DEEDS.

The following deeds are void as alleged in the complaint.

The deed from Moses and Samuel to Mary Francis Sherwood Hopkins (Ex. B) fails to describe the property attempted to be distributed, and was executed while the grantee was acting in a fiduciary capacity, as administratrix, as appears on the face of the deed.

The deed from Mary Francis, Moses and Samuel to Huntington, et al. (Ex. C), was executed without

an order or confirmation of the Probate Court, and while Mary Francis was acting as administratrix, and signed by her individually, and said deed fails to show on its face authority to execute same, as alleged in complaint. And further, the deed on its face shows a cash consideration of one dollar, which was inadequate consideration, and if the Probate Court exercised any authority over said sale, it exceeded its authority in attempting to settle a partnership business. That the deed from Ellen Colton, et al., to the Ione Coal and Iron Co. (Ex. D), in which Mary Francis, Moses and Samuel joined in, was executed while Mary Francis was acting as administratrix and signed by her individually; said deed fails to show on its face authority to execute same as alleged in the Complaint. All the property referred to and described in paragraphs 45 and 50 it is alleged in the complaint was sold without authority of the Court. That the defendants took said purported title with notice of the defects of record, and are not innocent purchasers for value, that said deeds were not executed by all the heirs of Mark Hopkins.

Rannela v. Rowe, 145 Fed. 296.

> "A warranty deed to lands belonging to the estate of a deceased made by his executor without authority, is ineffectual as against survivors, but where such executor was also a devisee of an interest in the land the deed being in excess of their power as executor passed title to their individual interest by estoppel."

In this case the executors sold land and executed a warranty deed in their representative capacity, of

the widow of the deceased, owner of the land and under the will she took half interest therein. The deeds were void, as executors' conveyance because no authority to make them had been procured from the Court having jurisdiction but nevertheless operated as conveyance of the widow's individual interest. This results from the doctrine of estoppel.

> "A trustee acting within his powers does not render himself liable on his contracts and conveyances; but whenever he exceeds his powers and undertakes to transfer and convey without authority he becomes personally answerable to the grantee on his covenants."

Citing

Morris v. Watson, 15 Minn. 212;
Tarver v. Haines, 55 Ala. 503;
Allen v. DeWitt, 3 N. Y. 276-289;
Brown v. Edson, 23 Vt. 435.

> "In the absence of some power contained in the will, or of authority derived from statute or order of court, neither an executor or administrator has any power whatever to sell the real estate of his deceased; an unauthorized conveyance may be enjoined at the suit of an heir; a deed made by representative without authority is void except to pass his own interest."
>
> 136 Cal. 416, 69 P. 87, 145 Fed. 296.

Cal. Jur., Vol. 11, Sec. 494, page 832.

> "Under the present system, no order directing a sale is required but, as under the former provisions, no title passes until the sale is confirmed by the Court. If an executor or administrator

without authority makes a deed, individually and as executor, his deed has the effect to transfer his interest as heir in the property, but the deed cannot operate to divest the rights of the other heirs."

The above deeds were executed in their individual capacity as shown on the face of the deeds, and only pass whatever title they had if any were recorded, and were notice to subsequent purchasers.

THE DECREE RECOGNIZED MARY FRANCIS AND SAMUEL HOPKINS AS INTERESTED PARTIES AND NOT HEIRS, WHICH IS DENIED BY THE ALLEGATIONS OF THE COMPLAINT; THIS ALSO APPEARS ON THE FACE OF THE COMPLAINT.

The Court exceeded its jurisdiction in distributing property to persons not found to be heirs, but only persons interested in the estate, and not heirs of the deceased. The Court attempted to distribute that portion of the estate described in the purported decree, solely upon an agreement entered into between parties not heirs of the estate.

THAT THE DECREE AND DEED FAIL TO DESCRIBE THE REAL ESTATE ATTEMPTED TO BE DISTRIBUTED, AND RECOGNIZED AND BASED ITS DISTRIBUTION UPON AN AGREEMENT BETWEEN MARY FRANCIS, MOSES AND SAMUEL, AS SHOWN ON THE FACE OF THE DECREE.

(Paragraph 19, Subsec. H of the Complaint.)

Sheppard v. Pepper, 133 Cal. 626 at 645.

"A judgment may be so uncertain in its description as to real estate involved as to be void and inoperative."

Bates v. Howard, 105 Cal. 173.

"A decree may be void on account of the uncertainty of its description."

Saterstrom v. Click Bros., 5 Pac. (2d) 21, 118 Cal. App. 379.

"Deed must contain such description as will enable property to be readily located by reference thereto."

Smith v. Cal. Portland Credit Co., 25 Pac. (2d) 1013, 134 Cal. App. 630.

"Deed failing to describe land so that it might be located, and furnishes no means by which description could be made more definite held void."

Sepulveda v. Apablasa, 77 Pac. (2d) 526, 25 Cal. App. (2d) 381.

"A deed was void for uncertainty, where it contained no definite or ascertainable description of the property intended to be conveyed."

While the above citations apply to deeds the same principle applies to judgments or decrees where they attempt to convey title to real estate.

In *Scott v. Woodworth,* 167 Pac. 543, at page 546; 34 Cal. App. 400, the Court said:

"To be valid on its face, a deed must contain such a description of the real property thereby intended to be conveyed as will enable the property to be readily located by reference to the description. It is true that the description by boundaries may be ambiguous or indefinite, and still the deed sufficient if it otherwise provides means whereby the description can be made certain and the land identified and located. Where, however, the description is so vague or uncertain that the property cannot be identified and located therefrom, and the writing itself does not furnish the means whereby the description may be made sufficiently definite and certain readily to locate the property, the instrument must be held void, since the imperfections of the description cannot be supplied through evidence extrinsic to the writing itself without running up against the positive mandate of the rule that a conveyance of real property must be in writing."

The propositions above stated are quite elementary, and need the citation of no authorities to confirm them; still we cite the following authorities as em-

bodying a clear elucidation of the principles involved therein:

Brandon v. Leddy, 67 Cal. 43, 7 Pac. 33;
Best v. Wohlford, 144 Cal. 737, 78 Pac. 293;
Donnelly v. Tregaskis, 154 Cal. 261, 97 Pac. 421;
People v. Lumpke, 41 Cal. 263;
Moss v. Shearer, 30 Cal. 467, 468;
Barker v. Southern R. W. Co., 125 N.C. 596, 34 S.E. 701, 74 Am. St. Rep. 658, 660; 2. *Devlin on Deeds,* § 1910;
13 *Cyc.* 543;
Fletcher v. Superior Court, 79 Cal. App. 468 at 477.

"The agreement or consent of the parties cannot give the Court the right to adjudicate upon any cause of action or subject matter which the law withholds from its cognizance, and in such cases the order or judgment of the Court is void notwithstanding such consent. Consent may be given of the person but not of the subject matter."

In the instant case the decree shows on its face that the Court based its distribution of the real estate on the consent of the parties.

See Decree, Ex. A, at page 38 of Complaint.

The complaint alleges that Mark Hopkins at the time of his death owned a one-fourth interest in the Southern Pacific Company, and the Central Pacific Railroad Company, as set out in plaintiffs' fourth and fifth cause of action, paragraphs 55 and 64, pages 29 and 32 of the Complaint.

It is further alleged in paragraph 59, page 30, and paragraph 66, page 32, that the descendants, the brothers and sisters of Mark Hopkins, own seven-eighths of the one-fourth interest.

It is alleged in paragraph 59, page 30, and paragraph 69, as follows:

> "Plaintiffs further allege that if said defendant corporation has transferred upon its books any of said stocks and bonds or entered thereon any assignment of the interest of plaintiffs in and to said stocks and bonds, or liquidated any stocks and bonds, such transfer, assignment, or liquidation of said stocks and bonds, or other interest of plaintiffs, was without authority of said heirs or of a court of law and in violation of the legal rights of said plaintiffs and their ancestors."

On account of the importance of the case, the appellants have gone into the facts and law bearing thereon, on which the Court based its order and judgment in dismissing the case at length, quoting from the Complaint and the citations for the convenience of the Court.

We have covered all the points made by the Court in its order and opinion upon which the Court based its order dismissing appellants' action, and assume that this Honorable Court, in determining this appeal will not go beyond the points upon which the District Court based its order; and that the Court held all other grounds upon which defendants' motions were made, were without merit.

We respectfully submit that the judgment and order dismissing said action on the grounds of laches be reversed, and the District Court be instructed to proceed with the trial of said action.

Dated, August 25, 1948.

BUSICK & BUSICK,
CHARLES H. SECCOMBE,
S. J. BENNETT,
Attorneys for Appellants.